87-1478

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1987

MEDALLION TELEVISION ENTERPRISES, INC.
and JOHN ETTLINGER,

Petitioners,

v.

SELECTV OF CALIFORNIA, INC., JAMES LEVITUS,
LIONEL SCHAEN, and RICHARD KULIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 3, 1988

Questions Presented

1. Whether the court below erred in holding that the substantively related and temporally distinct predicate acts alleged and established by petitioners failed to constitute a pattern of racketeering activity within the meaning of the Racketeer Influenced and Corrupt Organizations Act.

2. Whether, in analyzing the continuity of the pattern of racketeering activity alleged by petitioners, the courts below erred by disregarding, as being neither based upon "probable cause" nor material, an allegation that respondents committed an additional predicate act when they concealed their fraud from petitioners.

List of Parties and Rule 28.1 Statement

The parties to the proceedings below were the petitioners Medallion Television Enterprises, Inc. and John Ettlinger and the respondents SelecTV of California, Inc., James LeVitus, Lionel Schaen, and Richard Kulis.

Petitioner Medallion Television Enterprises, Inc. is wholly owned by petitioner John Ettlinger and has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on December 9, 1987, which affirmed the dismissal of the complaint in this action.

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is reported at 833 F.2d 1360, and is reprinted in the appendix hereto, beginning at p. 1a, *infra*.

The amended memorandum of decision and order of the United States District Court for the Central District of California (Rymer, D.J.), dated January 31, 1986, granting the motion for summary judgment and dismissing the complaint, is reported at 627 F. Supp. 1290, and is reprinted in the appendix hereto, pp. 10a-43a, *infra*. The memorandum of decision and order of the same district

court, dated June 28, 1984, denying a previous motion for summary judgment, has not been reported. It is reprinted in the appendix hereto, pp. 44a-56a, *infra*.

Jurisdiction

Petitioners commenced this action in the United States District Court for the Central District of California, invoking federal jurisdiction under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq*. On January 31, 1986, the district court granted respondents' motion for summary judgment and dismissed the complaint.

Petitioners appealed to the Ninth Circuit, which affirmed the dismissal of the complaint by opinion and judgment entered on December 9, 1987. No petition for rehearing was sought. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked pursuant to 28 U.S.C. §1254(1). This petition is filed within the time permitted by 28 U.S.C. §2101(c).

Statutes Involved

The statutes involved are 18 U.S.C. §§1961 and 1962, which are reprinted in the appendix hereto, pp. 57a-61a, *infra*.

Statement of the Case

The jurisdiction of the district court was invoked under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, *et seq*., and under 28 U.S.C. §1331 (general federal question jurisdiction).

Petitioner Medallion Television Enterprises, Inc. ("Medallion") and respondent SelecTV of California, Inc. ("SelecTV") are both engaged in the business of broadcasting and distributing television programs. In 1981, Medallion obtained the right of first refusal to acquire the broadcast rights to a professional boxing match that was

to be held in the Bahamas between Muhammed Ali and Trevor Berbick on December 11, 1981. In October 1981, by misrepresenting that SelecTV had commitments from pay and cable television stations around the United States to pay over two million dollars to telecast that fight, the individual respondents (who controlled SelecTV) induced Medallion and its owner, petitioner Ettlinger, to enter into a joint venture to acquire from the fight promoter the broadcast rights and to sell the telecast of the fight to pay and cable television stations. *See Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360, 1361 (9th Cir. 1987) ("*Medallion TV*"); Appendix, p. 2a. The joint venture—known as Medsel—was formalized in a written agreement dated October 27, 1981. *See* 627 F. Supp. at 1292 & n. 2. Appendix, p. 38a.

Subsequently, after Medsel had acquired the telecast rights from the Bahamian fight promoter, the respondents again misrepresented the number of licensing agreements SelecTV had obtained from television stations, thereby inducing petitioners to transfer letters of credit from Ettlinger's bank in Chicago to the Bahamas on November 9, 1981. *See* 627 F. Supp. at 1293; Appendix, pp. 13a-14a. The letters of credit, totalling over one million dollars, represented Medallion's share of the purchase price of the telecast rights. The balance of the purchase price was to be covered by SelecTV's corporate guarantee.

After having lost over one million dollars in the joint venture, Medallion discovered that SelecTV's representations as to its broadcast licensing agreements with television stations had been false. This action was instituted in October 1982.

The complaint alleges that both SelecTV and Medsel were enterprises within the meaning of 18 U.S.C. §1961(4); that SelecTV acquired and maintained an interest in or control of Medsel through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(b); and that the individual

respondents conducted and participated in the conduct of SelecTV's affairs through a pattern of racketeering activity, as proscribed by 18 U.S.C. §1962(c). *See* 833 F.2d at 1362; complaint ¶¶ 26-29. In deciding respondents' second motion for summary judgment, the district court found that a genuine controversy of fact existed as to certain of the predicate acts which comprised the alleged patterns of racketeering activity: wire fraud, in the form of telephone calls which induced Ettlinger to meet to discuss forming the joint venture, and mail fraud and interstate transportation of stolen property, in connection with SelecTV's having caused Ettlinger to transfer the letters of credit from his Chicago bank to the Bahamas. 833 F.2d at 1362. Appendix, p. 4a.

The district court, holding that these predicate acts were but components of a single criminal episode, dismissed the complaint, stating: "a 'pattern' of racketeering activity must include racketeering acts sufficiently unconnected in time and substance to warrant consideration as separate criminal episodes." 627 F. Supp. at 1297; Appendix, p. 24a.[1]

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[1] As it had in its June 28, 1984 decision and order denying respondents' first motion for summary judgment (*see* Appendix, pp. 53a-55a, *infra*), the district court found it to be without substantial controversy that a misrepresentation by respondents of telecast sales figures mailed to petitioners on November 30, 1981—before the fight but after the letters of credit had been transferred—was not material or indictable as mail fraud. 627 F. Supp. at 1293, n. 4. This was because the letters of credit were irrevocable. And, although the letters of credit were payable only upon the occurrence of the fight, petitioners had not met their burden of demonstrating "probable cause" to believe that, had they known the true facts, they could have enjoined the fight (thereby stopping payment under the letters of credit). In any event, concluded the district court, a pattern of racketeering activity was not established even if the November 30 cover-up of respondents' original misrepresentations was taken into account. *Id.* In affirming the district court, the Ninth Circuit did not discuss this issue, which was briefed by both sides.

After noting that it had not adopted as determinative the " 'continuity plus relationship' dictum" of this Court in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n. 14 (1985) ("*Sedima*"), the Ninth Circuit nevertheless analyzed petitioners' allegations of a pattern of racketeering activity in terms of relatedness and continuity. 833 F.2d at 1363; Appendix, p. 5a. Holding that the predicate acts alleged by petitioners were isolated and sporadic and not indicative of any threat of continuing criminal activity, the Ninth Circuit affirmed the district court's ruling that a pattern of racketeering activity had not been established. *Id.* at 1364-65; Appendix, pp. 6a-9a.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's holding that continuity can exist only where there is an ongoing, multi-purpose, and/or multi-victim scheme conflicts with the decisions of other Circuits.

Footnote 14 of this Court's *Sedima* decision has spawned a proliferating cottage industry of "pattern" litigation. Judicial attempts to define "continuity" have been marked by dramatic conflicts, not only between, but also within, the ten Circuits which have ventured into this thicket. The net result has been a lack of uniformity in outcomes and a pervasive doctrinal confusion which is well-illustrated by the Ninth Circuit's jurisprudence in this area.

At one pole is the "restrictive" bright-line standard enunciated by the Eighth Circuit, which requires multiple (substantively unconnected) episodes of racketeering activity in order to make out the continuity connoted by the term pattern. *E.g. Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). The appeal of this rule is that it appears to offer predictability, although it should be noted that, in reviewing criminal RICO convictions rather than dismissals of civil RICO complaints, the Eighth Circuit's

view of what constitutes separate episodes may be considerably more liberal. *United States v. Kragness*, 830 F.2d 842, 858 (8th Cir. 1987) (drug importation conspiracy involving three different types of drugs, and different geographical areas, suppliers, and customers held to be three separate schemes). In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3531 (U.S. January 20, 1988), two concurring Circuit Judges urged *en banc* reconsideration of the Eighth Circuit's multiple schemes requirement, as being inconsistent with RICO's statutory language and as having been criticized by three other Circuits as well as numerous district courts. Despite this, the multiple schemes standard has since been reaffirmed by the Eighth Circuit. *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 834 F.2d 148 (8th Cir. 1987).

At the other pole are the "expansive" pattern rules of the Second, Fifth and Eleventh Circuits, which appear to permit a pattern to be based upon nothing more than two related predicate acts occurring at different times. *United States v. Ianniello*, 808 F.2d 184, 192 & n. 15 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3459 (U.S. January 11, 1988); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986). The Second Circuit, in explicitly rejecting the Eighth Circuit's multiple episodes requirement, has indicated that the continuity requirement alluded to in *Sedima's* footnote 14 (and sought to be fostered by the multiple episodes rule) could instead be satisfied through the existence of an ongoing enterprise. *Ianniello, supra*, 808 F.2d at 191; *Beck, supra*, 820 F.2d at 51.

As one dissenting Second Circuit Judge has complained, however, by requiring, in subsequent cases, an indefinitely continuing enterprise, the Second Circuit has undercut its earlier decision in *Ianniello* "by putting back into the

RICO stew the multiple-episode ingredient that *Ianniello* sought to remove." *Furman v. Cirrito*, 828 F.2d 898, 908 (2d Cir. 1987) (Pratt, C.J., dissenting). Judge Pratt's dissent argues that, by engrafting an open-ended continuity requirement on the definition of enterprise, the Second Circuit not only eviscerated *Ianniello*, it also created a "mess" within the Circuit, as attested to by a compendium of wildly divergent district court decisions cited in his opinion. Judge Pratt warned that the "bedlam" would only worsen unless the Second Circuit provided "definitive and decisive direction." *Id.* at 909-10.

The Fifth Circuit has also retrenched from its original expansive position, grudgingly "bowing" to its earlier decision in *R.A.G.S. Couture, Inc. v. Hyatt, supra*, while urging that it be overturned *en banc*. *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987). Explicitly seeking to narrow the reach of civil RICO, the Fifth Circuit in *Montesano* circumvented *R.A.G.S.* by finding a lack of continuity in the association-in-fact enterprise alleged in that case. Thus, the law in the Second and Fifth Circuits appears to be the same.

The other Circuits which have grappled with this issue have adopted variants of a case-by-case, totality-of-the-circumstances formulation falling somewhere between the "restrictive" and "expansive" polar extremes originally mapped out by the Eighth Circuit, on one hand, and the Second, Fifth, and Eleventh Circuits, on the other hand. The common thread running through these cases is that, although multiple schemes are not indispensable to a finding of continuity, a unitary scheme can constitute a pattern of racketeering activity only if it includes separate transactions, distinct injuries, multiple purposes, multiple victims, and/or some ongoing characteristic which creates a threat of continuing criminal activity subsequent to (and above and beyond) the commission of the predicate acts. *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31-32 (1st Cir. 1987); *International Data Bank v. Zepkin*, 812 F.2d

149, 155 (4th Cir. 1987); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975-76 (7th Cir. 1986); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987).

While endorsing a factually-oriented standard akin to those fashioned by the First, Fourth, Seventh, and Tenth Circuits, the Third Circuit has explicitly rejected "the view that racketeering acts committed pursuant to a single scheme can constitute a RICO pattern only if the scheme is potentially ongoing or open-ended." *Barticheck v. Fidelity Union Bank/First Nat. State*, 832 F.2d 36, 39 (3d Cir. 1987). The court explained that equating continuity with "open-endedness" would produce anomalous results by allowing "a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective . . . . [but not] in a case where the scheme had fully accomplished its goal. Yet it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO." *Id.* The Ninth Circuit's rather nebulous continuity test—requiring a threat of continuing criminal activity subsequent to the commission of the underlying predicate acts (*see, e.g., Medallion TV*, 833 F.2d at 1364)—appears to conflict with the Third Circuit's more expansive standard.

In fact, because of the amorphous and shifting content of the Ninth Circuit's continuity standard, it is easier to identify decisions of other Circuits with which the Ninth Circuit is in conflict than it is actually to pinpoint the Ninth Circuit's rule. Not only has the Ninth Circuit declined to adopt as determinative the "dictum" contained in footnote 14 of this Court's *Sedima* decision (*Medallion TV*, 833 F.2d at 1363; *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 [9th Cir. 1987], *cert. denied*, 56 U.S.L.W. 3459 [U.S. January 11, 1988]), it has expressed agreement with the broad, expansive test devised by the Second and Eleventh Circuits, while seemingly rejecting not only the Eighth Circuit's restrictive test, but also the factually-oriented tests of the First, Seventh, and Tenth Circuits. *California*

Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, supra, 818 F.2 at 1469 n. 1. Further support for the view that the Ninth Circuit had joined the "expansive" camp was furnished in its decision in *Sun Sav. and Loan Ass'n v. Dierdorff,* 825 F.2d 187, 193 (9th Cir. 1987), where it stated:

> Thus, if a defendant commits two or more predicate acts that are not isolated events, are separate in time, and are in furtherance of a single criminal scheme, then RICO's pattern requirement is satisfied.

Notably, the *Sun Savings* panel went out of its way to criticize the district court's opinion in *this* case. As the Ninth Circuit pointed out, the requirement imposed by the district court in this case that the predicate acts be both temporally and substantively unconnected arguably placed "the continuity requirement into direct tension with the relationship requirement." *Sun Savings,* 825 F.2d at 193. Turning to the predicate acts which were before it, the *Sun Savings* court held that four predicate acts calculated to cover-up a kickback scheme were not isolated or sporadic and were, therefore, continuous. *Id.* at 194.

Because the *Sun Savings* decision had not augured well for the district court's opinion in this case, the court below was obliged to concede that "in our recent *Sun Savings* opinion we expressed certain reservations about the district court's opinion in this case." *Medallion TV,* 833 F.2d at 1364; Appendix, p. 8a. After making this concession, the Ninth Circuit affirmed anyway, stating that the alleged pattern was "a single, isolated, allegedly fraudulent inducement of Medallion to enter the joint venture." *Id.* at 1365; Appendix, p. 9a. The court also acknowledged that its test—pursuant to which acts which are not "isolated or sporadic" are continuous—did "not provide a bright-line rule." *Id.* The court asserted, however, that "as more cases are decided, it will become easier to distinguish between cases like this and *Schreiber,* which involved single victims and isolated transactions with no indication that the

defendant would need to commit further predicate acts, and cases like *Sun Savings* and *California Architectural*, which involved ongoing schemes, numerous victims, and a risk of continuing illegal activity." *Id.*

Aside from the difficulty of distilling a coherent standard from these Ninth Circuit cases, it is evident that, on the facts of this case, a pattern of racketeering activity would have been found to exist under the expansive test developed by the Second, Fifth and Eleventh Circuits and quite probably under the Third Circuit's reasoning in *Barticheck, supra*. Having invited the lower federal courts to compose a meaningful definition of "pattern," it is necessary that this Court now intervene in order to bring harmony to the cacophony of opinions emanating from the various Circuits.

II.

Based upon its misapprehension of this Court's decision in *Sedima*, the Ninth Circuit has incorrectly decided an important and recurring question of federal law.

Underlying the tortured reasoning of many recent "pattern" decisions is the misperception that this Court has announced that judicial development of the pattern concept can serve as a panacea for what appears to ail civil RICO. Footnote 14 of the *Sedima* decision makes no such pronouncement; in the text, the Court explained that the "extraordinary" uses to which civil RICO had been put stemmed from: (1) the breadth of the predicate offenses; (2) the failure of Congress to develop a meaningful concept of "pattern"; and (3) the failure of the courts to develop such a concept. *Sedima, supra*, 473 U.S. at 500. It is respectfully submitted that *Sedima* only meant to confer upon the lower courts the modest task of insuring that, in order to constitute a pattern, predicate acts must be related and temporally unconnected. Any more ambitious attempt to confine civil RICO to what is generally conceived to have been its original intent can only be accomplished by Congress. *See*

Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, C.J., concurring).

Absent amendatory legislation, there simply is no principled way in which the RICO statute, as written, can continue to serve as a bulwark against the depredations of organized crime without also being available as a tool in the fight against ordinary, garden variety, "white collar," commercial fraud. As this Court has stated, "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. [Citation omitted]. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Sedima*, 473 U.S. at 499.

Judicial efforts—such as the decision below—to curb all of civil RICO's perceived abuses by restrictively interpreting "pattern" are likely to founder for the following reasons.

1. As the Third Circuit observed in *Barticheck, supra*, there is no particularly logical reason for limiting the class of RICO plaintiffs to those persons who are still in the process of being victimized. Indeed, it is anomalous to insulate from RICO liability those culprits whose schemes have succeeded. *Barticheck, supra*, 832 F.2d at 39; *Furman v. Cirrito, supra*, 828 F.2d at 907 (Pratt, C.J., dissenting). Yet, that is just what the court below has done: merely because no additional fraudulent acts were needed after respondents had defrauded petitioners, their successful, completed scheme was deemed to be isolated and sporadic rather than ongoing and continuous.[2]

[2] The court below distinguished its earlier decision in *Sun Savings, supra*, on the grounds that there was no cover-up in this case. If this Court accepts the first question presented in this petition, it is respectfully requested also to pass upon the second question and to rule that the courts below erred in excluding from their consideration the act of mail fraud committed by respondents on November 30, 1981, after the transfer of the letters of credit but before the fight. The issue is not whether petitioners could prove—according to a "probable cause" standard or otherwise—that they could have stopped the fight. Even after a victim has parted irrevocably with his money,

(*footnote continued on following page*)

2. Requiring an open-ended pattern is not only anomalous, it effectively reads 18 U.S.C. §1962(b) out of the RICO statute. A person violates §1962(b) by acquiring or maintaining an interest in or control of an enterprise through a pattern of racketeering activity. In this case, SelecTV is charged with acquiring and maintaining an interest in or control of the Medsel joint venture through such a pattern. Typically, (and in this case), the acquisition of an interest in or control of an enterprise will not be an indefinitely ongoing undertaking. Once accomplished, the substantive violation has been committed and it should not matter at all whether additional predicate acts are contemplated or performed. The crabbed reading of "pattern" by the court below effectively eliminates from the RICO statute the substantive violation contained in §1962 (b). This undermines the intent of Congress, which saw the infiltration of organized criminal elements into legitimate businesses (which might continue to be run legitimately) as a paradigmatic problem to be redressed by RICO. There is no reason to believe that the term "pattern," which is defined in 18 U.S.C. §1961(5), was intended to have varying meanings depending upon which substantive subsections of §1962 were involved. Thus, a construction of "pattern"—such as the one advanced by the court below—which renders nugatory §1962(b) cannot be correct with respect to §1962(c) either. *See Ianniello, supra,* 808 F.2d at 192.

3. Just as "pattern" must have a consistent meaning throughout the different subsections of §1962, it must also have a consistent meaning regardless of whether violations of §1962 give rise to criminal prosecutions under §1963 or

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(*footnote continued from preceding page*)
each additional use of the mails to lull that victim into a false sense of security and to conceal the original fraud can be an act of mail fraud. Whether it is presents a jury question; summary judgment was inappropriate on this issue. *United States v. Sampson,* 371 U.S. 75, 80-81 (1962); *United States v. Shelton,* 669 F.2d 446, 458 (7th Cir.), *cert. denied,* 456 U.S. 934 (1982); *United States v. Toney,* 598 F.2d 1349, 1353 (5th Cir. 1979), *cert. denied,* 444 U.S. 1033 (1980).

civil actions under §1964(c). The Ninth Circuit's narrow definition of "pattern" thus jeopardizes the effectiveness of criminal RICO unless (as seems equally undesirable) courts begin improperly to give the term a different meaning in criminal prosecutions than in civil actions. Arguably, this unprincipled distinction has already begun to infect RICO jurisprudence in the lower federal courts. Compare: *United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986) with *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987); *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) with *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986); *United States v. Busher*, 817 F.2d 1409, 1412 (9th Cir. 1987) with *Medallion TV*.

4. The case-by-case approach taken by the court below inevitably results in subjective decision-making in what has become the critical battleground of civil RICO litigation. With this almost metaphysical standard, the question whether a pattern has been pleaded will all too often be decided based upon the personal preferences and instincts of the judges who happen to be presiding. Statutory construction should not proceed on an "I know it when I see it" basis. *Cf. Morgan v. Bank of Waukegan*, 804 F.2d 970, 977 (7th Cir. 1986), *quoting Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *Papai v. Cremosnik*, 635 F. Supp. 1402, 1410 (N.D. Ill. 1986);*Waste Recovery Corporation v. Mahler*, 566 F. Supp. 1466, 1468 (S.D.N.Y. 1983) (relying upon Justice Stewart's dictum to support the now-discredited "racketeering injury" requirement).

The drawbacks of this subjective approach to defining "pattern" have been conceded by its proponents. *Morgan v. Bank of Waukegan, supra*, 804 F.2d at 977 ("the legal test is necessarily less than precise . . . [and] will necessarily be a bit rough around the edges at first, but as courts begin to apply it to a greater number of factual patterns, its contours should become clearer."); *Medallion TV*, 833 F.2d at 1365 ("Our approach admittedly does not provide a bright-line rule. We believe, however, that as more cases

are decided, it will become easier to distinguish between [the] cases . . . "). The problem with this incremental approach is that it invites judges to give vent to their personal beliefs as to who is and who is not a "racketeer." As previously noted, a simpler, more objective standard, comporting with the broad reach of the statute and assuring consistency of results, has already been articulated by the Ninth Circuit: the commission of two or more temporally separate acts in furtherance of a single scheme satisfies RICO's pattern requirement. *Sun Savings, supra,* 825 F.2d at 193.

5. Undue emphasis of the "continuity" prong of *Sedima's* "pattern" discussion upsets the internal equilibrium of the RICO statute. Section 1961(5) defines "pattern" as requiring *only two* or more *acts* (not "transactions," "episodes," or "schemes") within a ten-year period. If Congress had had some endlessly ongoing, perpetual scheme in mind, surely it would have set forth some more imposing minimum requirement. Moreover, as some courts have noted, "relatedness" and "continuity" are inevitably at odds with one another; the more the continuity prong is stressed, the less likely it is that there will be any relationship between the predicate acts. *Morgan v. Bank of Waukegan, supra,* 804 F.2d at 975; *Sun Savings, supra,* 825 F.2d at 193-94. Acts involving different victims, forms of misconduct, and time periods may have "continuity," but they will be likely to lack "relatedness." Moreover, because §1964(c) confers standing only upon persons who have been injured "by reason of" a violation of §1962, it seems conceptually strained to define "pattern" (a key element of a substantive violation of §1962) in terms of injuries suffered by other persons.

The importance of this recurring and unresolved question of federal law is substantial. The decision below conflicts with the letter and spirit of the statute, with *Sedima's* insistence that civil RICO be liberally construed to effectuate its remedial purposes, and with the proper

role of courts in applying statutes with which they may not agree. This Court's guidance is needed in order to provide certainty, consistency of results, and fidelity to the statutory purpose.

CONCLUSION

For the foregoing reasons, this Court is respectfully urged to grant this petition for certiorari. If the Court determines to review the first question presented, the second question presented should be decided as well.

Dated: March 3, 1988

Respectfully submitted,

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Opinion and Judgment of the U.S. Court of Appeals for the Ninth Circuit, Dated 12/9/87

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEDALLION TELEVISION ENTERPRISES, INC., JOHN ETTLINGER,
Plaintiffs-Appellants,

v.

SELECTTV OF CALIFORNIA, INC., JAMES LEVITUS, LIONEL SCHAEN, RICHARD KULIS,
Defendants-Appellees.

No. 86-5595

D.C. No.
CV-82-5195-PAR

OPINION

Appeal from the United States District Court
for the Central District of California
Pamela A. Rymer, District Judge, Presiding

Argued and Submitted
September 10, 1987—Pasadena, California

Filed December 9, 1987

Before: Mary M. Schroeder, Dorothy W. Nelson and William A. Norris, Circuit Judges.

Opinion by Judge Norris

NORRIS, Circuit Judge:

Medallion Television Enterprises, Inc. and its owner John Ettlinger (collectively, "Medallion") appeal the district court's grant of summary judgment in favor of SelecTV of California, Inc. and its officers and directors Lionel Schaen, James LeVitus, and Richard Kulis (collectively, "SelecTV")

in this civil suit under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c). Medallion contends that the district court erred in determining, as a matter of law, that the various allegedly fraudulent acts committed by SelecTV did not constitute a "pattern of racketeering activity" under RICO, 18 U.S.C. § 1961(5). We affirm.

I

Medallion and SelecTV are in the business of broadcasting and distributing television programs. Both believed that a professional boxing match between Muhammed Ali and Trevor Berbick that was to be held in December 1981 in the Bahamas provided the opportunity for a potentially lucrative broadcasting venture. Ettlinger obtained from the match promoter the right of first refusal to acquire the broadcast rights to the fight. Shortly thereafter, Ettlinger spoke by telephone with Schaen, the president of SelecTV, and arranged a meeting to discuss jointly acquiring and exploiting the telecast rights. At the meeting, Schaen allegedly misrepresented to Ettlinger that SelecTV had commitments from pay and cable television stations around the United States to pay a total of at least two million dollars to telecast the fight.

Several days later, Medallion and SelecTV entered into a joint venture to acquire the rights and to sell the telecast to pay and cable television stations. The joint venture purchased the rights from the Bahamanian fight promoter for a price in excess of two million dollars. SelecTV provided a corporate guarantee of payment for part of that sum, and Ettlinger obtained two letters of credit for more than one million dollars from his Chicago bank to cover the balance of the purchase price. Medallion later discovered that SelecTV did not in fact have two million dollars' worth of broadcast licensing agreements with television stations. The parties were unable to sell telecast rights to as many stations as they had anticipated, and both Medallion and SelecTV lost money in the joint venture.

Medallion filed this suit seeking to hold SelecTV responsible for its losses. The complaint alleged, among other things, that SelecTV's representations about the number of licensing agreements it had obtained had induced Medallion to enter into the joint venture and to obtain the letters of credit, and that these representations constituted mail fraud, wire fraud, and interstate transportation of stolen property, in violation of 18 U.S.C. §§ 1341, 1343, and 2314, respectively. These, the complaint alleged, formed a "pattern of racketeering activity" rendering SelecTV liable for treble damages under the civil liability provisions of RICO, 18 U.S.C. §1964(c). Medallion also alleged various pendent state claims.

After lengthy discovery and pretrial skirmishing, the district court granted SelecTV's motion for summary judgment on the RICO claims and dismissed the pendent state claims. *Medallion TV Enterprises, Inc. v. SelecTV of California, Inc.*, 627 F. Supp. 1290 (C.D. Cal. 1986) [hereinafter *Medallion TV*]. The sole issue on appeal is whether the alleged acts of mail fraud, wire fraud, and interstate transportation of stolen property constitute a "pattern of racketeering activity." We agree with the district court that they do not.

II

This court reviews de novo a grant of summary judgment and will affirm if the pleadings and supporting materials show the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) [hereinafter *California Architectural*], *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. Oct. 15, 1987).

Civil liability under RICO is premised on violation of one or more of the provisions of section 1962. 18 U.S.C. § 1964(c). The provisions at issue here are section 1962(b), which prohibits a person from acquiring or maintaining any

interest in or control of an enterprise through a pattern of racketeering activity, and section 1962(c), which prohibits a person from participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962.

The district court determined that the joint venture was an enterprise and that the allegedly fraudulent acts could constitute racketeering activity within the meaning of RICO. *Medallion TV*, 627 F. Supp. at 1294-95; *see* 18 U.S.C. § 1961(1) and (4). The predicate acts that the court thought to have been alleged were wire fraud, in the form of telephone calls between Schaen and Ettlinger in which Schaen induced Ettlinger to meet to discuss forming the joint venture, and mail fraud and interstate transportation of stolen property, in connection with SelecTV's having caused Ettlinger to transfer the letters of credit from his Chicago bank to the Bahamas. *Medallion TV*, 627 F. Supp. at 1293-94. These determinations are not seriously contested on appeal. Accordingly, the only issue for us to decide is whether the predicate acts constitute a "pattern of racketeering activity."

What suffices to establish a pattern of racketeering activity has generated much discussion in the federal courts recently.[1] The number and diversity of opinions is due, at least in part, to the fact that RICO does not define the term; RICO states only that a " 'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). The Supreme Court also has not spoken definitively on this question. It has suggested, however, in reliance on the legislative history, that "two isolated acts of racketeering activity do not constitute a pattern . . . . 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be

[1] *See, e.g., Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191-92 (9th Cir. 1987) (collecting cases); *California Architectural*, 818 F.2d at 1469 n. 1 (collecting cases); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. Oct. 13, 1987).

effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.' " *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n. 14 (1985) [hereinafter *Sedima*] (quoting S. Rep. No. 617, 91st Cong., 2d Sess. 158 (1969)) (emphasis added by the Supreme Court). The Court noted that the definition of pattern given elsewhere in the same bill could provide additional guidance: " 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " *Id.* (quoting 18 U.S.C. § 3575(e)).

The articulation of a coherent definition of "pattern" is essential to the rational development of RICO law. The Court observed in *Sedima* that the extension of civil RICO to include many fraud claims may be attributable to "the failure of Congress and the courts to develop a meaningful concept of 'pattern.' " 473 U.S. at 500. Moreover, as Justice Powell suggested in his dissent in *Sedima*, a proper construction of the pattern requirement "could go a long way toward limiting the reach of the statute to its intended target—organized crime." *Id.* at 528 (Powell, J., dissenting). *See generally* Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 Notre Dame L. Rev. 83 (1986).

It is on this poorly mapped terrain that this circuit has, in recent cases, explored what constitutes a pattern of racketeering activity. *Jarvis v. Regan*, No. 84-5900, slip op. at 7-10 (9th Cir. Nov. 27, 1987), *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191-94 (9th Cir. 1987) [hereinafter *Sun Savings*]; *California Architectural*, 818 F.2d at 1469; *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986) [hereinafter *Schreiber*]; *see also Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 918 (9th Cir. 1987) (per curiam) (finding pattern to be established without discussion of a general definition of pattern). Although we have not adopted *Sedima's* "continuity plus relationship" dictum as "a determinative two-pronged test," those factors are relevant considerations. *Sun Savings*, 825 F.2d at 192.

Whether the predicate acts alleged or proven are sufficiently related is seldom at issue, *see Sun Savings*, 825 F.2d at 192, and this case is no exception. There is no question that the predicate acts were related: all were directed toward inducing Medallion to enter the joint venture and to provide funds to obtain the telecast rights.

The presence or absence of continuity among the acts is the distinguishing factor in our cases and is the factor that most influences our decision in this case. Continuity does not require a showing that the defendants engaged in more than one "scheme" or "criminal episode." *Sun Savings*, 825 F.2d at 193-94; *California Architectural*, 818 F.2d at 1469. The circumstances of the case, however, must suggest that the predicate acts are indicative of a threat of continuing activity. *Jarvis*, No. 84-5900 slip op. at 9; *Sun Savings*, 825 F.2d at 193; *Schreiber*, 806 F.2d at 1399.[2]

Here, that threat is absent. This case involved but a single alleged fraud with a single victim. All of SelecTV's assertions about the number of licensing agreements it had obtained were parts of its single effort to induce Medallion to form the joint venture in order to obtain the broadcast rights from the

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[2] Two cases we cited with approval in *California Architectural*, 818 F.2d at 1469 n. 1, are consistent with this analysis. The Second Circuit, in *United States v. Ianniello*, noted that it analyzes the relatedness and continuity elements in the context of the enterprise requirement rather than the pattern requirement. 808 F.2d 184, 189-91 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987). The court found continuity in the context of a single fraudulent scheme involving repeated deceptive liquor license applications in successive years because the underlying profit-skimming scheme had no obvious terminating goal or date. *Id.* at 191-92. Similarly, the Eleventh Circuit found the requisite pattern in allegations that as part of a single overall scheme, accountants provided, over a three-year period, numerous false financial statements that induced five banks to extend $60 million in credit to a firm that was on the verge of bankruptcy. *Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir. 1986). Both cases state that separate schemes or episodes are not necessary to establish a pattern. Both are consistent with our holding that the predicate acts must be part of an ongoing fraudulent scheme that poses a risk of continuing illegal activity.

promoters. In essence, Medallion's allegations concern a single fraudulent inducement to enter a contract. Once the joint venture had acquired the broadcast rights, the fraud, if indeed it was a fraud, was complete. Medallion has not directed us to any evidence that SelecTV defrauded it in any other way as a part of this scheme or any other, nor is there anything in the nature of the transaction to suggest that SelecTV would have needed to commit any other fraudulent acts. Similarly, notwithstanding Medallion's unsupported assertions to the contrary, Medallion was the single victim of the alleged fraud.[3]

Thus, this case is substantially similar to *Schreiber*, in which we held that allegations that the defendant had fraudulently obtained a single shipment of goods to sell in violation of Schreiber's exclusive distributing agreement did not establish a pattern because there was no threat of continuing activity. 806 F.2d at 1399. *See also, Jarvis*, No. 84-5900 slip op. at 9-10 (pattern requirement not satisfied by allegations that legal aid organizations committed three predicate acts of mail and wire fraud in obtaining a single federal grant to defray costs of opposing a ballot initiative). By contrast, in the cases in which we found the pattern requirement satisfied, the alleged predicate acts indicated a threat of continuing activity. In *Sun Savings*, the predicate acts consisted of four instances of mail fraud in which the defendant, who was Sun Savings and Loan Association's president and chief executive officer, sent letters to govern-

[3] Medallion asserted in its brief and at oral argument that it was not the only victim. Medallion argues that a financier, Victor Sayyah, as well as the fight promoter and the TV stations were defrauded by SelecTV's false claims about the number of licensing agreements it had secured. Medallion later conceded, however, that the stations were not victims because they got everything they had bargained for—the telecast of the fight. As for the other alleged victims, Medallion has pointed to no evidence, and neither we nor the district court found any, that anyone other than Medallion was a victim of this supposed fraud. From all that appears, the fight promoter got what it bargained for: it sold the telecast rights. Medallion has not presented any evidence to show that Sayyah was also a victim of the fraud.

mental agencies and to an outside auditor in an attempt to conceal a scheme in which he received kickbacks from customers for whom he approved large loans. 825 F.2d at 190. The scheme posed a threat of continuing activity because it "covered up a whole series of alleged kickbacks and receipts of favors, occurred over several months, and in no way completed the criminal scheme." *Id.* at 194 & n. 5. Similarly, in *California Architectural,* the complaint alleged that the defendant tile manufacturer repeatedly induced numerous plaintiff ceramic tile dealers to stock its tile based on false assurances that it would continue in business and would continue to supply tile when in fact it had decided to close. 818 F.2d at 1467. There were multiple fraudulent sales and multiple victims, and the alleged inducements continued for five months until the business finally closed. *Id.* at 1469. *See also Televideo Sys., Inc.,* 826 F.2d at 918 (holding that thirteen acts of fraud related to ongoing scheme to embezzle company funds involving multiple victims established pattern of racketeering activity).

We are aware that in our recent *Sun Savings* opinion we expressed certain reservations about the district court's opinion in this case. 825 F.2d at 193. Our holding today is consistent with the views we articulated there. As we noted in *Sun Savings,* the district court's language in this case requiring that there be "separate criminal episodes" to establish a pattern can be interpreted in two ways. *Id.* at 193 n. 4 (construing *Medallion TV,* 627 F. Supp. at 1297). We suggested that if "episode" is construed to mean an act, event, or transaction, then the multiple episode requirement is consistent with our view that there must be more than a single act, event, or transaction to establish a pattern. 825 F.2d at 193 n. 4. If, however, an episode is taken to encompass a series of substantively related transactions, then multiple episode requirement would "unreasonably limit[] the ambit of RICO and overlook[] the Supreme Court's admonition that RICO be broadly read." *Id.* (citing *Sedima,* 473 U.S. at 497). Now that we have had the opportunity to subject both the district court's opinion and

the record in this case to close scrutiny, we conclude that, regardless of the words chosen to describe the transaction involved in this case, the court properly determined that the pattern requirement has not been met. As discussed above, we are confronted here with a single, isolated, allegedly fraudulent inducement of Medallion to enter the joint venture to exploit the rights to telecast the fight. There was no pattern of racketeering activity.

Rather than attempting to distinguish between single "episodes" or "schemes" that may be a pattern, and single "events" or "transactions" that may not, we prefer to frame the inquiry as whether the acts are isolated or sporadic, on the one hand, or whether they indicate a threat of continuing activity, on the other. *See Sun Savings,* 825 F.2d at 194. Our approach admittedly does not provide a bright-line rule. We believe, however, that as more cases are decided, it will become easier to distinguish between cases like this and *Schreiber,* which involved single victims and isolated transactions with no indication that the defendant would need to commit further predicate acts, and cases like *Sun Savings* and *California Architectural,* which involved ongoing schemes, numerous victims, and a risk of continuing illegal activity.

Although there may be cases that present a close question on the pattern issue, this is not one of them. If the fraud alleged here constitutes a pattern of racketeering activity, rare would be the fraud that could not be pleaded as a RICO case. Although we observe *Sedima's* mandate that RICO be construed broadly, *see* 473 U.S. at 497, we cannot believe that Congress intended that RICO should apply to a single, isolated transaction such as this.

SelecTV's request for attorneys fees on appeal under Fed. R. Civ. P. 11 is denied. The judgment of the district court is

AFFIRMED.

Amended Memorandum of Decision and Order of the United States District Court for the Central District of California, Dated 1/31/86

MEDALLION TV ENTERPRISES, INC., et al., Plaintiffs,

v.

SELECTV OF CALIFORNIA, INC., et al., Defendants.

No. CV 82-5195 PAR (MCx).

United States District Court, C.D. California.

Jan. 31, 1986.

Avery H. Einhorn, Flax and Rosenfeld, Beverly Hills, Cal., for plaintiffs.

Louis R. Miller, Wyman, Bautzer, Rothman, Kuchel & Silbert, Los Angeles, Cal., for defendants.

AMENDED MEMORANDUM OF DECISION AND ORDER

RYMER, District Judge.

Plaintiffs Medallion TV Enterprises, Inc. ("Medallion") and its owner, John Ettlinger, have brought this action against SelecTV of California ("SelecTV"), and its

officers and directors James LeVitus, Lionel Schaen, and Richard Kulis for violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1962(b), (c), (d), as well as for various state law claims. The Court has jurisdiction over this action pursuant to 18 U.S.C. § 1964(c) and the doctrine of pendent jurisdiction.

Defendants move for summary judgment under Fed.R.Civ.P. 56, essentially asking the Court to reconsider its June 28, 1984 Memorandum Of Decision And Order ("Order") denying defendants' previous motion for summary judgment, in light of the United States Supreme Court's recent decision in *Sedima, S.P.R.L. v. Imrex Co.*, — U.S. —, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) and this Court's decision in *Allington v. Carpenter*, 619 F.Supp. 474 (C.D. Cal.1985). For the reasons stated below, defendants' motion is granted.

I. INTRODUCTION

To be liable under 18 U.S.C. § 1962(b), a defendant must (1) acquire or maintain (2) any interest in or control of any enterprise (3) through a "pattern" (4) of "racketeering

activity." To be liable under Section 1962(c), a defendant must (1) participate (2) in the affairs of an "enterprise" (3) through a "pattern" (4) of "racketeering activity." In addition, Section 1962(d) renders a defendant liable for conspiring to violate Sections 1962(b) and 1962(c). "Racketeering activity" is defined as any act indictable under several provisions of Title 18 of the United States Code. 18 U.S.C. § 1961(1)(B). The acts, enumerated in the RICO Act, are commonly called "predicate acts" and include the conduct alleged by plaintiffs: mail fraud, 18 U.S.C. § 1341; wire fraud, *id.* § 1343; and interstate transportation of stolen property, *id.* § 2314.

The facts of this case, described in the Court's Order and not genuinely controverted by the parties in this motion,[1] are as follows. Plaintiffs and defendants sought to obtain the rights to and to telecast the heavyweight prizefight between Muhammed Ali and Trevor Berbick in the Bahamas on December 11, 1981. In September or October 1981, Ettlinger obtained from the fight promoter the right of first refusal for television rights to the fight. In early October, Ettlinger and the individual defendants, who controlled SelecTV, met to discuss the possibility of joining

together to telecast the fight. Eventually, plaintiff Medallion and defendant SelecTV entered into a joint venture, called Medsel, to acquire and exploit the rights by selling the telecast to cable and pay television stations. The agreement was later reduced to writing.[2] In late October, Medsel obtained the telecast rights from Sports Internationale, the Bahamian fight promoter. As part of the Medsel joint venture agreement, SelecTV agreed to sell the television rights to pay and cable television stations in the United States and Canada. Medallion assumed responsibility for selling telecast rights throughout the rest of the world.

Although SelecTV and Medallion attempted to sell the rights, the sales results were disappointing. Both SelecTV and Medallion lost money on the joint venture. On October 6, 1982, plaintiffs filed their Complaint, seeking to hold defendants responsible for their losses in the fight.

In denying defendants' motion for summary judgment in its June 28, 1984 Order, the Court relied on pre-*Sedima* law that allowed a civil RICO claim to be based on two or more predicate acts, even if those predicate acts arose from the same criminal transaction. The Court found that there

was a genuine controversy of fact regarding the existence of a scheme to defraud by defendants that resulted in the following predicate acts: wire fraud, in connection with telephone calls by Schaen to Ettlinger on October 8 and 9 regarding a face-to-face meeting at a restaurant to discuss entering into the venture, at which Schaen allegedly made fraudulent representations; mail fraud, in connection with Schaen's and LeVitus's causing Ettlinger to use the telephone on November 9 to transfer letters of credit from his Chicago bank to the Bahamas; and transportation of stolen property, also in connection with Schaen's and LeVitus's causing Ettlinger to make the transfer.[3] In addition, the Court specified two issues to be without substantial controversy. First, it found that an internal memorandum of November 30, 1981 from Schaen to LeVitus, which was mailed to Ettlinger and which allegedly contained misrepresentations of sales figures, was not mailed in furtherance of the scheme to defraud. Second, the Court ruled that phone calls and mailings by defendants to television stations in their sales efforts, including letters, contracts, and offers, were not made in furtherance of the scheme to defraud.[4]

II. LIABILITY UNDER 18 U.S.C. §§ 1962(b), (c)

Viewing the facts in the light most favorable to the plaintiffs in this motion for summary judgment, the following predicate acts may exist: the telephone calls on October 8 and 9, 1981 between Schaen and Ettlinger; and Ettlinger's transfer of the letters of credit on November 9 as a result of those conversations. In its previous Order, the Court relied on pre-*Sedima* law holding that the predicate acts alleged by plaintiffs, if proved, could support RICO liability. In light of *Sedima*, however, the Court concludes that the predicate acts, even if proved, could not support a finding of a "pattern" as required for liability under Section 1962(c).

1. *Enterprise.*

Plaintiffs allege that SelecTV and Medsel were both enterprises for the purposes of 18 U.S.C. §§ 1961(4), 1962(b), (c) (Complaint ¶¶ 26, 27). Defendants argues that plaintiffs cannot satisfy the "enterprise" requirement. Two elements are necessary to establish an "enterprise" under 18 U.S.C. §§ 1961(4), 1962(b), (c). First, there must be "evidence of an ongoing organization, formal or informal, and ... evidence that the various associates func-

tion as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981). Second, the enterprise must have an existence separate and apart from the pattern of activity in which it engaged. *Id.; compare United States v. Tillett*, 763 F.2d 628, 632 (4th Cir.1985); *United States v. Riccobene*, 709 F.2d 214, 221–24 (3d Cir.), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.1982), *cert. denied*, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982) (a RICO enterprise must have " 'an ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity") *with United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir.), *cert. denied*, 464 U.S. 840, 104 S.Ct. 133, 78 L.Ed.2d 128 (1983); *United States v. Weinstein*, 762 F.2d 1522, 1536–37 (11th Cir. 1985) (upholding RICO's application to situations "where the enterprise [is], in effect, no more than the sum of the predicate racketeering acts").

In the instant case, defendant SelecTV cannot be the "enterprise" for purposes of RICO, since it cannot at the same time be the "person" sued under 18 U.S.C. §§ 1962(b), (c). *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir.1984); *see also Ben-*

nett v. United States Trust Co., 770 F.2d 308, 314–15 (2d Cir.1985); *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 400–02 (7th Cir.1984), *aff'd per curiam*, 473 U.S. ——, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir.1982), *aff'd in part and rev'd in part on other grounds*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983); *Willamette Savings & Loan v. Blake & Neal Finance Co.*, 577 F.Supp. 1415, 1426–27 (D.Ore.1984). Neither can Medallion argue that the culpable person in this case is not SelecTV but its individual officers, employees, or agents: LeVitus, Schaen, and Kulis. "These attempts at factual distinctions do not make any real difference since a corporation cannot operate except through its officers and agents." *Tarasi v. Dravo Corp.*, 613 F.Supp. 1235, 1237 (W.D.Pa. 1985). RICO's use of the term "enterprise" "was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit...." *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir.1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983), *cited in Rae*, 725 F.2d at 481.

Nevertheless, plaintiffs could contend that Medsel' the joint enterprise entered into by Medallion and SelecTV to broadcast the Ali-Berbick fight, was the "enterprise" for purposes of RICO. Medsel is not a named defendant in this case. The facts indicate that it had an existence and purpose apart from those of the predciate acts alleged by plaintiffs; it was, in essence, more than the sum of the predicate acts. The Court therefore assumes that the "enterprise" requirement of RICO is satisfied for purposes of this summary judgment motion.[5]

2. *Pattern.*

The October 8 and 9 telephone calls and November 9 transfer of the letters of credit satisfy 18 U.S.C. § 1961(5)'s threshold requirement that a "pattern" include at least two acts of racketeering activity. However, as the Supreme Court noted in *Sedima*, "proof of two acts of racketeering activity, without more, does not establish a pattern." *Sedima*, 105 S.Ct. at 3285 n. 14 (quoting 116 Cong.Rec. 18,940 (1970) (statement of Sen. McGlellan). It is the factor of "*continuity plus relationship*" that combines to produce a pattern. *Id.* (quoting S.Rep. No. 91–617, 91st Cong., 1st Sess. 158 (1969) (emphasis in original) [herein-

after cited as S.Rep.]). Therefore the alleged predicate acts must show both "continuity" and "relatedness" to constitute a "pattern" under Section 1962. *See Sedima*, 105 S.Ct. at 3285 n. 14.

Relatedness. The relatedness of the predicate acts is established through proof of common perpetrators or victims, or similar purposes, results, or methods of commission. *Id.; see also United States v. Stofsky*, 409 F.Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir.1975), *cert. denied*, 429 U.S. 819, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976); *cf.* 18 U.S.C. § 3575(e) ("criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events"). Here, the participants (SelecTV, Schaen and LeVitus) were the same, and the alleged acts of wire and mail fraud and transportation of stolen monies had the same victims. Moreover, the acts had the same purpose: To cause Ettlinger to transfer letters of credit in order to finance the telecasting of the Ali-Berbick match. With the same perpetrators, the same victims, the same methods of commission, and the same motive, the acts clearly were not disconnected but were parts of a single scheme.

Continuity. Plaintiffs must allege that the predicate acts occurred in different criminal episodes in order to show *continuity* of racketeering activity. *See Sedima,* 105 S.Ct. at 3285 n. 14. The requirement that plaintiffs in a RICO action demonstrate that the predicate acts occurred in different criminal episodes is consistent with the connotation of multiple events implicit in the term "pattern" and, more importantly, is the only construction that gives meaning to Congress' intended rejection of RICO liability predicated upon isolated or sporadic criminal acts. *See* ABA Section of Corporation, Banking & Business Law, Report of the Ad Hoc Civil RICO Task Force 203–08 (1985) (" 'pattern' requirement was intended as a means of limiting RICO to those cases where the required predicate offenses were committed in a manner which characterizes the perpetrator as a person who commonly commits such crimes. Only by requiring multiple predicate offenses occurring in two or more separate criminal episodes, can this goal be achieved in the RICO statute."). RICO is "not aimed at the isolated offender." *Sedima,* 105 S.Ct. at 3285 n. 14 (quoting 116 Cong.Rec. 35193 (1970) (statement of Rep. Poff)). As the report of the Senate Committee on the Judiciary explained:

> The concept of 'pattern' is essential to the operation of the statute. One isolated 'racketeering activity' was thought insufficient to trigger the remedies provided ... largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce the pattern.

S.Rep. at 158, *quoted in Sedima,* 105 S.Ct. at 3285 n. 14.

In *Northwest Trust Bank/O'Hare v. Inryco, Inc.,* 615 F.Supp. 828, 832 (N.D.Ill. 1985), for example, the district court held that a complaint alleging two predicate acts occurring within a month failed to state a claim under RICO because such acts did not constitute a "pattern." *Id.* at 833. Even if three more acts alleged in the complaint and occurring 7 and 10 months after the first two were proved to be predicate acts, the five acts would not show a "pattern" because "[t]hey still implemented the *same* fraudulent scheme as the first two mailings—and the single scheme does

not appear to represent the necessary 'pattern of racketeering activity.'" *Id.* "It is difficult," the court said, "to see how the threat of continuing activity stressed in the Senate Report could be established by a single criminal episode." *Id.* at 832. The word "pattern"

> connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'

Id. at 831 (emphasis in original). In *United States v. Moeller*, 402 F.Supp. 49, 57–58 (D.Conn.1975), the district court noted:

> While the statutory definition makes clear that a pattern can consist of only two acts, . . . the common sense interpretation of the word 'pattern' implies acts occurring in *different criminal episodes*, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity. . . . [T]he normal canon of narrowly construing penal statutes points toward such an interpretation.

Finally, in *Exeter Towers Associates v. Bowditch*, 604 F.Supp. 1547, 1554 (D.Mass. 1985), an action by a limited partnership against the general partners regarding a mortgage transaction, the district court held:

> [T]he connotations of a 'pattern of racketeering activity,' as that phrase is used in the RICO statute, are not satisfied by proof that, in effectuating the purchase of a single mortgage, the defendants committed two or more predicate acts of mail fraud. To construe the statute as applying in these circumstances would be to give it a sweep so broad as to be inconsistent with manifested congressional objectives. Most substantial business transactions involve two or more uses of the mail during negotiations. To hold that two such uses of the mail, in circumstances otherwise satisfying the prerequisites of proof of an offense under the mail fraud statute, are sufficient to constitute a 'pattern of racketeering activity' would be to sweep into federal courts, under RICO, the great majority of actions for fraud in commercial transactions.

Consistent with this intent to exclude single criminal events, a "pattern" of racketeering activity must include racke-

teering acts sufficiently unconnected in time and substance to warrant consideration as separate criminal episodes. The key to demonstrating a "pattern" is not merely the number of predicate acts, or the time span in which they occur, *see Inryco*, 615 F.Supp. at 833, but also whether they relate to *separate* criminal episodes. In the instant case, all plaintiffs can prove at most is a series of acts occurring within a two-month period relating exclusively to the telecast of the boxing match: the two telephone calls setting up the conference between Schaen, LeVitus and Ettlinger; and Ettlinger's transfer of the letters of credit as a result of the meetings. Together the acts constitute a single criminal episode. They do not constitute a "pattern" of racketeering activity. Summary judgment is thus appropriate for defendants under plaintiff's cause of action for violation of 18 U.S.C. §§ 1962(b), (c).

III. LIABILITY UNDER 18 U.S.C. § 1962(d)

Plaintiffs argue in their Opposition that even if their claims under Sections 1962(b) and (c) are dismissed, their claim under Section 1962(d) cannot be because a conspiracy to violate RICO does not require two predicate acts, or, indeed, any overt act

at all. Section 1962(d) prohibits persons from "conspiring to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affair through a pattern of racketeering activity." *United States v. Carter*, 721 F.2d 1514, 1529 (11th Cir.1984). Plaintiffs rely on *United States v. Alonso*, 740 F.2d 862, 871–72 (11th Cir.1984) and *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2349, 80 L.Ed.2d 822 (1984) for the proposition that liability under Section 1962(d) does not require a showing of two predicate acts or, indeed, *any* overt acts.

These criminal prosecutions under RICO, however, are inapposite to the instant civil action. The private right of action under 18 U.S.C. § 1964(c) requires "injur[y] in [plaintiff's] business or property by reason of a violation of section 1962"; that language presupposes an overt act. In *Alonso*, the Eleventh Circuit limited its holding to the assertion that "*conviction* of substantive RICO offenses is not an absolute prerequisite to conviction under the RICO conspiracy provisions." *Alonso*, 740 F.2d at 872 (emphasis added). The Eleventh Circuit in *Coia*, 719 F.2d at 1124, did hold that *proof* of an overt act was not necessary for conviction under Section 1962(d). The Court relied in part on *Singer*

v. United States, 323 U.S. 338, 340–42, 65 S.Ct. 282, 283–84, 89 L.Ed. 285 (1945), in which the Supreme Court concluded that because the particular conspiracy statute it was construing did not on its face require an overt act, no overt act requirement would be implied. The statute before the Supreme Court thus "punishe[d] conspiracy 'on the common law footing.'" *Id.* at 340, 65 S.Ct. at 283 (quoting *Nash v. United States*, 229 U.S. 373, 378, 33 S.Ct. 780, 782, 57 L.Ed. 1232 (1913)). *Alonso* and *Coia* are not inconsistent with the federal common law of conspiracy, under which "[c]onspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *United States v. Rodriguez*, 546 F.2d 302, 306 (9th Cir.1976). The crime of conspiracy and the subsequent commission of the crime that is the object of the conspiracy may be prosecuted and punished as two separate crimes. The underlying rationale is that the conspiracy "poses distinct dangers quite apart from those of the substantive offense": namely, the combination of persons to achieve unlawful ends, making it more likely that more complex and far-reaching crimes will be committed and less likely that individuals will abandon the criminal enterprise. *Iannelli v. United States*, 420 U.S. 770, 777–79, 95 S.Ct. 1284, 1289–91, 43 L.Ed.2d

616 (1975). "[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts." *Callanan v. United States*, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961).

In contrast to criminal conspiracy, which may be prosecuted and punished as a crime in itself because of the harm it poses to the public, a civil conspiracy under common law gives a plaintiff a cause of action only by virtue of the harm that conspiracy causes him individually. "Unlike a criminal conspiracy, where the conspiracy itself forms the gist of the crime, in a civil conspiracy, it is the overt acts producing damage to the plaintiff that gives rise to liability." *Kajtazi v. Kajtazi*, 488 F.Supp. 15, 21 (E.D.N.Y.1978); *see also Pacific Telephone & Telegraph Co. v. MCI Telecommunications Corp.*, 649 F.2d 1315, 1319 (9th Cir.1981) (under California law, civil conspiracy, "[u]nlike its criminal counterpart, ... in order to be actionable requires [an] independently wrongful act and resulting damages"); *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F.Supp. 1139, 1160 (D.Del.1980) ("A civil conspiracy cannot be established by proof of a conspiracy alone. The existence of a conspiracy desgined to injure a

plaintiff provides him with no cause of action. A conspirator's liability must be based upon overt acts done pursuant to the conspiracy"). Thus, in order for a plaintiff to have a private cause of action under 18 U.S.C. § 1962(d), there must at the very least be one or more overt acts causing injury to the plaintiff or "his business or property" under 18 U.S.C. § 1964(c).

This conclusion is supported by RICO's legislative history. RICO's two predecessor bills, S. 2048 and S. 2049, introduced in the Senate by Senator Hruska in 1967 (parallel bills were introduced by Representative Poff in the House) sought to apply antitrust theories to the problem of combatting organized crime's infiltration of legitimate business. Indeed, S. 2048 was framed as an amendment to the Sherman Act that would prohibit investment of unreported income from one line of business into another. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L.Rev. 237, 249–54 (1982). Congress took no action on the proposed bills.

In January 1969, Senator McClellan introduced S. 30, the Organized Crime Control Act. While the bill did not contain a RICO provision, Senator McClellan later reviewed before the Senate the extent of

organized crime in the United States and the need to combat it. 115 Cong.Rec. 5872 (1969). On March 20, 1969, Senator Hruska introduced S. 1623, the Criminal Activities Profits Act, which, he explained, were a synthesis of the two bills he had introduced earlier. Although Senator Hruska no longer proposed coupling the bills with existing antitrust statutes, instead intending that the bills become part of the United States criminal code, he continued to speak of the proposed laws in antitrust terms:

> [The bill] attacks the economic power of organized crime and its exercise of unfair competition with honest businessmen on two fronts—criminal and civil.
>
> The criminal provisions of the bill prohibit the investment, in any business which is conducted in or which affects interstate commerce, of income which either has not been reported for Federal income tax purposes or has been derived from carrying on certain specified criminal activities.
>
> . . . . .
>
> In addition to this criminal provision, the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of courts to apply the Sherman

> Anti-Trust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under the act. This bill fills that gap. Patterned closely after the Sherman Act, it provides for private treble damage suits, prospective injunctive relief, unlimited discovery procedures and all the other devices which bring to bear the full panoply of our antitrust machinery in aid of the businessman competing with organized crime.

Id. at 6993. "Standing alone, the criminal provisions may not be necessary," Senator Hruska said. "In fact, the criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill." *Id.* After several days of hearings on S. 30 and S. 1623, Senators McClellan and Hruska jointly introduced S. 1861, the Corrupt Organizations Act, which ultimately became Title IX of the Organized Crime Control Act of 1969, RICO's immediate predecessor. For the first time, the proposed bill spoke in terms of a "pattern" of racketeering activity and an "enterprise." *Id.* at 9569. Three proposed provisions closely tracked the present language of 18 U.S.C. §§ 1962(a), (b)(c). *Id.* There was, how-

ever, no provision prohibiting a conspiracy to violate the provisions of the bill; nor was there a private treble damage remedy. *Id.* Nevertheless, the bill, Senator McClellan stated, "dr[ew] heavily upon the remedies developed in the field of antitrust." *Id.* at 9567. The bill was referred to the Senate Committee on the Judiciary on April 18, 1969. *Id.* at 9568.

In December 1969, the Senate Judiciary Committee reported on S. 30 as amended by S.1861. Blakey, *supra*, at 265–70. For the first time, the proposed bill contained the anti-conspiracy provision of Section 1962(d); it did not, however, contain a private right of action for treble damages. 116 Cong.Rec. 581 (1970). Nevertheless, the Committee believed the civil remedies then included were adequate:

> There is no doubt that the common law criminal trial, hedged in as it is by necessary restrictions on arbitrary governmental power to protect individual rights, is a relatively ineffectual tool to implement economic policy. It must be frankly recognized, moreover, that the infiltration of legitimate organizations by organized crime presents more than a problem in the administration of criminal justice. What is ultimately at stake is not only the security of individuals and their prop-

> erty, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adapting the civil remedies developed in the antitrust field to the problem of organized crime.

S.Rep. at 80–81. RICO thus "brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of civil remedies, including a civil investigative demand, now available in the antitrust area." *Id.* at 81. Yet the Senate Report coupled this analysis with the proviso that the "pattern" element was essential to the statute in that one isolated episode of racketeering activity was insufficient to trigger the provisions of the bill "because the net would be too large and the remedies disproportionate to the gravity of the offense." *Id.* at 158. Infiltration of legitimate business normally required more than one racketeering activity "and the threat of continuing activity" to be effective. "It is this factor of continuity plus relationship which combines to produce a pattern." *Id.* The bill, still without a private action for treble damages, passed on January 23, 1970. 116 Cong.Rec. 972 (1970).

S. 30 was referred to the Committee on the Judiciary of the House of Representa-

tives on January 26, 1970, *id.* at 1103; two bills paralleling the Title IX RICO provision of S. 30, H.R. 19215 and H.R. 19586, were introduced in the House. *Id.* at 31914, 35242. The House passed an amended version of S. 30 with Sections 1962(a), (b), (c), and (d) unchanged; the definition of "pattern" intact except for the fact that the House version required the two predicate acts making up the "pattern" to be committed within ten years of each other; and a new private right of action for treble damages under Section 1964(c). *Id.* at 35340–41, 35363. The Senate passed the House version with no changes. Blakey, *supra*, at 279–80.

Thus while the criminal provisions of RICO *on their face* require no overt act for there to be a conspiracy under 18 U.S.C. § 1962(d), since under common law the conspiracy in itself is sufficient to confer such liability, the House addition of a private right of action for treble damages for violation of Section 1962 is entirely statutory and must be read in light of the House's and Senate's use of existing antitrust statutes as a model for RICO. The House, in adding Section 1964(c), was clearly influenced by the private action for treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for the two statutes are very similar in language. Section 1 of the Sher-

man Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, read together, give "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," including "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," a private right of action for treble damages. The private right of action under RICO, 18 U.S.C. § 1964(c), is phrased in similar terms, referring to "[a]ny person injured in his business or property by reason of a violation of section 1962."

The Clayton Act provides a private cause of action for persons harmed by the anticompetitive acts resulting from the conspiracy and tracks the common law of civil conspiracy. But a mere conspiracy to violate antitrust laws, without more, does not give a plaintiff a cause of action under the Clayton Act. "[R]ecovery for a statutory violation is not based on the conspiracy itself but on injury to the plaintiff produced by specific overt acts pursuant to the conspiracy." *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc.* 346 F.2d 1012, 1014 n. 1 (9th Cir.), *cert. denied*, 382 U.S. 958, 86 S.Ct. 433, 15 L.Ed.2d 362 (1965); *see also Pocahontas Supreme Coal Co. v. National Mines Corp.*, 90 F.R.D. 67,

74 (S.D.N.Y.1981). A plaintiff who fails to show that he was injured in his business or property by the alleged conspiracy has no standing to sue for violation of the antitrust laws. *Davies v. Carnation Co.*, 352 F.2d 393, 396–97 (9th Cir.1965). The provision for a private right of action for treble damages under RICO—a provision whose wording tracks that of Section 4 of the Clayton Act, contained in a statute modeled after the antitrust laws in general—must be read in the same way. Without overt acts causing injury, there is no cause of action under 18 U.S.C. § 1964(c) for violation of 18 U.S.C. § 1962(d). *Cf. Sedima*, 105 S.Ct. at 3286 (holding that injury by reason of a Section 1962(c) violation requires only harm caused by the predicate acts forming the pattern in order for there to be standing under Section 1964(c).

Plaintiffs argue, in the alternative, that Section 1964(c), read in conjunction with Section 1962(d), requires only injury caused by the conspiracy, not injury caused by a pattern of racketeering activity resulting from the conspiracy.[6] Under this theory, injury caused by overt acts resulting from the conspiracy creates a cause of action even though those overt acts do not make up a "pattern." While it is true that under the Clayton act a plaintiff need be

harmed by only one overt act in order to have a cause of action, and RICO on its face provides a private cause of action to a person "harmed" by a violation of Section 1962(d), Sections 1962(d) and 1964(c) together must be read in light of the Senate Judiciary Committee's special emphasis on the "pattern" requirement. This was in the same Senate Report that added the conspiracy provision to RICO. Assuming *arguendo* that plaintiffs are correct in asserting that a private cause of action lies under Section 1962(d) even if only one overt act harms the plaintiff, that contention would not get plaintiffs past the second step of the analysis: That defendants "conspire[d]" under Section 1962(d) to *violate* Sections 1962(b) and (c). These sections, read together, require that the defendant "conspire" to "acquire or maintain ... any interest in or control of any enterprise" through a "pattern of racketeering activity" or that he "conspire" to "participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity." The evidence in this case, however, suggests that any "conspiracy" on the part of defendants extended to the single Medsel episode and did not contemplate separate criminal episodes that would constitute a "pattern" within the meaning of RICO. Plaintiffs have produced no evidence, and

the Court can discern none, raising a genuine issue of fact that defendants conspired to engage in a "pattern" of racketeering activity, and plaintiffs cannot survive a motion for summary judgment based on what might be adduced at trial.[7] "It is not the intent of Rule 56 to preserve purely speculative issues of fact for trial...." *Exxon Corp. v. F.T.C.*, 663 F.2d 120, 128 (D.C.Cir. 1980); *see also Zweig v. Hearst Corp.*, 521 F.2d 1129, 1135–36 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975).

Summary judgment is thus appropriate under plaintiff's claim for violation of 18 U.S.C. § 1962(d).

IV. PENDENT CLAIMS

Because defendants' motion for summary judgment against plaintiffs is granted, the Court has no pendent jurisdiction to hear plaintiffs' pendent state claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). The pendent state claims are thus dismissed without prejudice to the merits.

Accordingly, it is ordered that:

1. Defendants' motion for summary judgment against plaintiffs on plaintiffs'

claims for violation of 18 U.S.C. §§ 1962(b), (c), (d) is granted;

2. Plaintiffs' pendent state claims are dismissed without prejudice.

FOOTNOTES

1. Defendants in their Motion for Summary Judgment rely exclusively on the Court's June 28, 1984 Order, arguing that even if the "predicate acts" regarding which this Court found genuine issues of material fact were to exist, they could not support judgment for plaintiffs as a matter of law. Plaintiffs, in their opposing papers, rely on the pleadings of this case and offer no new evidence to counter defendants' Motion. They do contest the Court's reasoning regarding its finding of two issues that were without substantial controversy, but the Court, upon reviewing those objections, will let those findings stand. *See* note 4 *infra*.

2. The written agreement is dated October 27, 1981 (Defendants' January 7, 1984 Motion For Summary Judgment Ex. B).

3. The evidence is unclear as to whether the transfer of the letters of credit was accomplished in separate mailings. If this were the case, each separate mailing in furtherance of the alleged scheme to defraud by defendants would be a separate violation of the mail fraud statute. One may be convicted of mail fraud whether he uses the mails or causes use of the mails for purposes of executing the scheme to defraud. *United States v. Bohonus*, 628 F.2d 1167, 1173 (9th Cir.1980); *see also Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954).

4. Plaintiffs argue that the Court "seriously misapprehended" these other acts in ruling that they were not predicate acts, and used incorrect legal analysis. The Court rejects plaintiffs' arguments.

First, plaintiffs attack the Court's finding that the internal memorandum was not part of the scheme to defraud because the letters of credit by that time were irrevocable. The letters being irrevocable, the alleged misrepresentation could not have altered plaintiffs' conduct; thus the misrepresentations could not have been material, precluding a finding of a violation of 18 U.S.C. § 1341. Plaintiffs note in their Opposition that the letters of credit, even if irrevocable, were payable only upon occurrence of the fight. They argue that if they had been aware of the true facts as to the lack of sales, they could have cancelled the fight or enjoined it, thus precluding payment of the letters of credit.

The RICO statute, however, requires that a plaintiff demonstrate facts tantamount to "probable cause" sufficient to support an indictment against the defendant with reference to the predicate acts. *Taylor v. Bear Stearns & Co.*, 572 F.Supp. 667, 683 (N.D.Ga.1983); *Bache, Halsey, Stuart, Shields, Inc. v. Tracy Collins Bank & Trust Co.*, 558 F.Supp. 1042, 1045 (D.Utah 1983). In order for defendants' misrepresentations to be indictable, they must be material. *United States v. Halbert*, 640 F.2d 1000, 1007–08 (9th Cir.1981). Where there is no evidence showing that the alleged misrepresentations and non-disclosure could or would have made plaintiff change his conduct or course of dealing, there can be no fraud. *United States v. Ballard*, 663 F.2d 534, 541–42 (5th Cir.1981); *see also United States v. Halbert*, 712 F.2d 388, 390 (9th Cir. 1983), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984). Plaintiffs' argument that

they "could have" cancelled or enjoined the fight had they known the true state of sales is speculation, not evidence. It is uncertain, for example, how Medallion, which had television rights to the Ali-Berbick fight but was not its promoter nor the manager of either of the pugilists, would have had the power to cancel or enjoin the fight. Plaintiffs having produced no evidence that they had the ability to stop the fight had they known of the misrepresentations, the Court declines to revise its previous ruling. *See Ballard*, 663 F.2d at 541.

Second, plaintiffs argue that the Court wrongly analyzed the mailings and telephone calls to third parties in finding them "not false in and of themselves," thus ignoring its own dicta under *Bohonus*, 628 F.2d at 1173, and *Pereira*, 347 U.S. at 8, 74 S.Ct. at 362, that "[m]ailing of documents which are themselves innocent may still constitute the crime of mail fraud if the documents are mailed in execution of a scheme to defraud." The Court, however, based its finding on the facts that

> [t]here is no evidence that these mailings and phone calls contained false or misleading statements. *Nor has any evidence or argument been advanced to show how these communications were made in furtherance of the scheme to defraud.* Indeed, these communications suggest that SelecTV attempted to sell the rights in fulfillment of its obligations under the joint venture agreement.

(Emphasis added). Plaintiffs still have not produced such evidence or argument, and the Court stands by its initial finding.

Even if the Court were to find that these acts were predicate acts, however, its analysis of the "pattern" element under Section 1962(c) would be unchanged, since those acts arose from the same allegedly criminal episode.

5. Defendants also argue that plaintiffs cannot demonstrate that Medsel was an enterprise under Section 1962(b) because Medsel did not exist until October 27, 1981, *see* note 2 *supra*, —after the telephone calls between Schaen and Ettlinger, but before the transfer of the letters of credit. Thus, defendants argue, only one predicate act occurred during Medsel's existence and that is insufficient to create liability under Sections 1961(5) and 1962(b). Defendants claim that Section 1962(b) requires proof of the existence of the enterprise at the time of the unlawful acts. Nothing in the language of Section 1962(b) or the RICO legislative history, however, mandates such an interpretation. Section 1962(b), on its face, does not preclude the possibility that a RICO defendant can commit predicate acts so as to acquire an interest in an enterprise even though the enterprise does not exist all the time that the predicate acts are committed. Furthermore, the cases cited by defendants, *Otto v. Variable Annuity Life Insurance Co.*, 611 F.Supp. 83 (N.D.Ill.1985) and *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980), are inapposite. *Otto* merely adopted the Eighth Circuit view, also adopted by this Court, that a plaintiff "must plead and prove that 'the various associates function[ed] as a continuing unit' and that the enterprise existed 'separate and apart from the pattern of activity in which it engage[d].'" *Otto*, 611 F.Supp. at 89 (quoting *Turkette*, 452 U.S. at 583, 101 S.Ct. at 2529). *Weisman* stated in dicta that Section 1962(c) "is apparently inapplicable to acts of racketeering activity occurring before the creation or acquisition of an enterprise," but explicitly contrasted the language of that subsection, prohibiting a person from "conduct[ing] or participat[ing]" in the enterprise, to the different wording of Section 1962(a) and (b). *Weisman*, 624 F.2d at 1125 & n. 6.

In any case, when Medsel came into existence would be relevant only to the question of what acts of the defendants could be considered predicate acts for the purposes of Section 1962(c), not whether Medsel was an enterprise. While Medsel could not have existed at the time of the October 8 and 9 telephone calls between Schaen and Ettlinger about the proposed business meeting to discuss their joint venture, it was in existence by November 9, when Ettlinger transferred the letters of credit. Because the evidence is unclear as to whether these were separate mailings of the letters of credit, *see* note 3 *supra*, it is unclear whether there were two predicate acts occurring during Medsel's existence. Thus the Court declines to rule, for purposes of this summary judgment motion, that plaintiffs cannot meet the threshhold requirement under 18 U.S.C. § 1961(5) of showing two predicate acts for purposes of proving a "pattern" under 18 U.S.C. § 1962(c).

6. Plaintiffs' counsel so asserted during oral argument on November 25, 1985.

7. Even if the Court were to hold that there could be civil liability for violation of 18 U.S.C. § 1962(d) absent proof that the defendants conspired to engage in a "pattern" of racketeering activity, it could not hold that plaintiffs would have such a cause of action in this case, since the only defendants are SelecTV and its officers. A corporation and its officers are not capable of a civil conspiracy for purposes of the RICO act. *See, e.g., Yancoski v. E.F. Hutton & Co.*, 581 F.Supp. 88, 97 (E.D.Pa.1983); *Landmark Savings & Loan v. Rhoades*, 527 F.Supp. 206, 209 (E.D.Mich.1981); *see also Haddad v. Shell Oil Co.*, 423 F.Supp. 1384, 1388 (C.D.Cal.1976). *Cf. Webb v. Culberson, Heller & Norton, Inc.*, 357

F.Supp. 923, 924 (N.D.Miss.1973) (corporation can only act through its officers and representatives, who cannot conspire with corporation of which they are a part).

Memorandum of Decision and Order of the United States District Court for the Central District of California, Dated 6/28/84

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEDALLION TV ENTERPRISES, INC., *et al.*,

Plaintiffs,

vs.

SELECTV OF CALIFORNIA, INC., *et al.*,

Defendants.

No. CV 82-5195-PAR

MEMORANDUM OF DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SPECIFYING ISSUES THAT ARE WITHOUT SUBSTANTIAL CONTROVERSY

Plaintiffs Medallion TV Enterprises, Inc. ("Medallion") and John Ettlinger have brought this action against SelecTV of California ("SelecTV"), James LeVitus, Lionel Schaen, and Richard Kulis for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") [18 U.S.C. § 1961 *et seq.*] as well as for various state law claims. The Court has jurisdiction over this action pursuant to 18 U.S.C. § 1964(a) and the doctrine of pendent jurisdiction.

Defendants initially moved to dismiss the RICO claim for failure to state a claim under Rule 12(b)(6) Fed.R.Civ.P. After that motion was denied, the parties engaged in more than a year of discovery. Defendants now move for summary judgment on plaintiffs' RICO claim and for dismissal of the pendent state law claims.

Having considered the evidence and points and authorities filed by the parties and having heard argument and studied

the additional post-hearing briefs, the Court believes that defendants are not entitled to summary judgment on plaintiffs' RICO claim.

This action concerns the efforts by plaintiffs and defendants to obtain and to telecast the heavyweight prizefight between Muhammed Ali and Trevor Berbick in the Bahamas on December 11, 1981. In September or October 1981, plaintiff Ettlinger, the owner of Medallion TV, obtained from the fight promoter the right of first refusal for television rights to the fight. In early October, Ettlinger and the individual defendants, who control SelecTV, met to discuss the possibility of joining together to telecast the fight. Eventually, plaintiff Medallion and defendant SelecTV entered into a joint venture, known as Medsel, to acquire and exploit the rights by selling the telecast to cable and pay television stations. This agreement was later reduced to writing. [Defendants' Exhibit B.] In late October, Medsel obtained the telecast rights from Sports Internationale, the Bahamian fight promoter. [Defendants' Exhibit L.] As part of the Medsel joint venture agreement, SelecTV agreed to sell the television rights to pay and cable television stations in the United States and Canada. Medallion assumed responsibility for selling telecast rights throughout the rest of the world.

Although SelecTV and Medallion attempted to sell the rights, the sales results were disappointing. Both SelecTV and Medallion lost money in the joint venture. The parties have each asserted various reasons for the commercial failure of the fight. By its complaint, Medallion and Ettlinger seek to hold defendants responsible for their losses from the fight.

Defendants move for summary judgment on two grounds. First, defendants contend that there is no genuine issue of material fact as to whether defendants engaged in acts constituting a "pattern of racketeering activity" as defined by the RICO statute. [18 U.S.C. § 1961(1)(B) and (5).] Second, defendants urge that plaintiffs have not suffered the kind of

injury that RICO was designed to compensate. Plaintiffs argue that they have tendered evidence that raises a genuine issue of fact as to whether defendants engaged in a pattern of racketeering involving mail fraud [18 U.S.C. § 1341], wire fraud [18 U.S.C. § 1343], and interstate transportation of stolen property [18 U.S.C. § 2314]. Plaintiffs also urge that the damage they suffered is compensable under the RICO statute.

To be liable for violating the RICO statute [18 U.S.C. § 1962] a defendant must engage in a "pattern of racketeering" which involves at least two acts of "racketeering activity" occurring within specified time limits [18 U.S.C. § 1961(5)]. "Racketeering activity" is defined as any act indictable under several provisions of Title 18 of the United States Code. [18 U.S.C. § 1961(1)(B).] The acts, which are enumerated in the RICO statute, are sometimes referred to as "predicate acts" and include the conduct alleged by plaintiff: mail fraud, wire fraud and interstate transportation of stolen property.

The RICO statute requires that a plaintiff demonstrate facts tantamount to "probable cause" sufficient to support an indictment against the defendant with reference to the predicate acts. *Taylor v. Bear Stearns & Co.*, 572 F.Supp. 667, 683 (N.D. Ga. 1983); *Bache, Halsey, Stuart, Shields, Inc. v. Tracy Collins Bank & Trust Co.*, 558 F.Supp. 1042, 1045 (D. Utah 1983)

Violation of Federal Mail and Wire Fraud Statutes
[18 U.S.C. §§ 1341 and 1343]

The elements of mail fraud are: (1) the formation of a scheme or artifice to defraud, and (2) the use of the mails in furtherance of the scheme. *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980). Wire fraud simply substitutes the use of interstate transmission facilities for use of the mails. *United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978), *cert. denied*, 439 U.S. 896 (1979); *United States v. Lemire*, 720 F.2d 1327, 1334-35 & n.6 (D.C. Cir. 1983); *United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970).

The Ninth Circuit, along with several other circuits, has recognized that the language of 18 U.S.C. § 1341 specifies several alternative ways in which the mail fraud offense may be committed, including: (1) a scheme or artifice to defraud, or (2) obtaining money or property by means of false or fraudulent pretenses, representations or promises. *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981); *United States v. Schaflander*, 719 F.2d 1024, 1025 (9th Cir. 1983) (misrepresentation); *see United States v. Frankel*, 721 F.2d 917, 920 (3d Cir. 1983) and cases cited therein.

Because the relevant language of the wire fraud statute is identical to the relevant language of the mail fraud statute, cases construing the mail fraud statute are equally applicable to wire fraud. *United States v. Lemire*, 720 F.2d at 1334 n. 6; *see United States v. Louderman*, 576 F.2d at 1387 n.3. The only significant difference between the two statutes is the act on which federal jurisdiction is based. *United States v. Blassingame*, 427 F.2d 329 (3d Cir. 1970).

Although the scope of the mail fraud statute is not limited to common law concepts of fraud, the Ninth Circuit takes the view that 18 U.S.C. § 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. *United States v. Bohonus*, 628 F.2d 1167, 1170 (9th Cir. 1980) ("The key inquiry is, therefore, to determine how far Congress intended to extend § 1341 and then to guarantee that a defendant is not convicted for committing acts which Congress did not intend to be punishable by § 1341.") (quoting *United States v. McNieve*, 536 F.2d 1245, 1247 (8th Cir. 1976)). A problem with this strategy is that "the sparse legislative history accompanying § 1341 and its predecessor statutes reveals only one clearly articulated purpose: to prevent the use of the mails in furtherance of fraudulent enterprises." *United States v. Barta*, 635 F.2d 999, 1005 (5th Cir. 1980).

In the absence of articulated statutory guidelines, courts have applied the mail fraud statute to a variety of schemes. *See* discussion in *United States v. Lemire*, 720 F.2d 1327,

1335-1339 (D.C. Cir. 1983) and *United States v. Barta*, 635 F.2d 999, 1005-1007 (2d Cir. 1980).

At oral argument the Court expressed its concern about whether plaintiff could point to any facts that demonstrate a "scheme to defraud." Upon close consideration, it does appear that the evidence, when viewed in a light most favorable to plaintiffs, could support a finding of a scheme to defraud, or alternatively false representations made for the purpose of obtaining property rights. Therefore, the Court cannot find the absence of a genuine issue of material fact.

The scheme to defraud centers on the alleged misrepresentation made by at least two of the individual defendants to plaintiff Ettlinger that they had at least $2 million in commitments from various pay and cable television stations. This representation was allegedly made to Ettlinger by defendant Schaen on October 9, 1981 at Jimmy's Restaurant. [Ettlinger Deposition, Vol. I, pp. 71-72.] From Ettlinger's testimony, it is not unreasonable to conclude that Ettlinger believed that Schaen and SelecTV had firm oral commitments that would amount to several million dollars in gross sales. [*Id.*] Similar representations about SelecTV's sales were also allegedly made by defendant LeVitus to Ettlinger on October 17, 1981. [*Id.* at pp. 95-99.]

Neither Schaen nor LeVitus directly deny making these representations in their declarations. However, they do argue that Ettlinger could not have relied upon the representations because Ettlinger knew that SelecTV did not have rights to sell. The argument must fail for two reasons. First, in general, mail and wire fraud does not require reliance on the defendant's false representations by the victim. *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960); *United States v. Brien*, 617 F.2d 299, 311 (1st Cir. 1980); *United States v. Halbert*, 640 F.2d 1000, 1007-1008 (9th Cir. 1981) (requirement of materiality should apply to misrepresentations which form the basis of mail fraud but no reliance necessary). *Cf. United States v. Lemire*, 720 F.2d 1327, 1336

(D.C. Cir. 1983) (in context of breach of fiduciary duty must show materiality and reliance). Second, the question of whether or not the statements could be reasonably relied upon by Ettlinger would appear to be, under the circumstances of this case, an issue for the trier of fact. Ettlinger testified that Sheldon Saltman, a man with twenty-five years of experience in production of television and sports programming, and the man who brought Schaen and Ettlinger together, told Ettlinger that SelecTV had been out selling the fight. [Ettlinger Deposition at 51-52.] Moreover, Schaen apparently believed, before talking to Ettlinger, that SelecTV would be able to obtain television rights from Martin Cooper who was competing with Ettlinger for the rights. [Schaen Declaration, ¶2; Ettlinger Deposition at 58.] Depending upon the representation actually made by Schaen, it is not unreasonable to conclude that Ettlinger had reason to believe that SelecTV had firm commitments from buyers regardless of who had the rights at the time.

Additional evidence in the record supports a scheme to defraud that goes beyond the alleged misrepresentations. First, SelecTV was one of several possible partners that Ettlinger could have joined with in exploiting the television rights to the Ali-Berbick fight, and Schaen and LeVitus were aware of the potential competition. [Deposition of LeVitus, at 67; Ettlinger Deposition, Vol. 1 at 65-66 and 70.] Second, SelecTV had approached others in the hope of obtaining the rights evidencing its intent to obtain what it believed to be valuable rights. Ettlinger originally intended that his partner in the rights guarantee the $1 million purse to be paid to Ali as the price for the rights. [Ettlinger Deposition, Vol. 1, pp. 39, 77-78.] However, LeVitus and Schaen advised Ettlinger that SelecTV could not put up letters of credit in the amount required to purchase the rights from the Bahamian promoters but that, in addition to their own corporate guarantees, SelecTV had commitments sufficient to cover letters of credit obtained by Medallion and Ettlinger. [Ettlinger Deposition, Vol. 1, pp. 89-99.] *See United States v. Blassingame*, 427 F.2d 329 (2d Cir. 1970) (defendant poses as

celebrity in order to secure credit for cost of charter flight). Although both SelecTV and Ettlinger each put up more than $1 million to consummate the deal with the Bahamian promoters, the ability to obtain letters of credit in large sums was critical to the deal. Ettlinger agreed to use his credit to obtain the credit documents required by the promoters, and there is at least some evidence in the record that Ettlinger agreed to do this because SelecTV had commitments from others. [Ettlinger Deposition, Vol. 1, pp. 95-99.]

Thus, although hardly compelling, the evidence presented by the parties does create at least an inference that defendants, interested in selling television rights to a major sports event in the national market, used the alleged misrepresentation as a means of inducing plaintiffs into creating a joint venture with SelecTV, to obtain and exploit the television rights of the Ali-Berbick match, and to induce plaintiffs to use their good credit to obtain additional financing for the purchase of the rights. On this theory, plaintiffs used a misrepresentation to obtain property in the form of rights to televise the fight and the use of Medallion's and Ettlinger's credit to purchase the rights. Medallion agreed to share its right of first refusal to the television rights with a partner it would not have otherwise selected but for the misrepresentation.

A conviction for mail or wire fraud requires specific intent to defraud. *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980). The evidence supports the reasonable inference that defendants were attempting to gain rights based on their fraudulent statements. The alleged misrepresentations, if actually made, certainly could be found as going to the heart of plaintiff's agreement with defendants and the reason for Medallion joining SelecTV. *United States v. Halbert*, 640 F.2d at 1007 (materiality necessary). *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970). Moreover, the circumstances of the case can support a reasonable inference that defendants made the alleged misrepresentations intentionally or with reckless disregard for the truth that the commitments were

not firm. [Schaen Declaration, ¶18.] *United States v. Farris*, 614 F.2d 634 (9th Cir. 1979).

Defendants argue that these facts cannot support an intent to defraud because all parties recognize that defendants entered into the joint venture were interested in making money for themselves as well as their partners and unfortunately ended up losing money. Although the failure to benefit from a scheme may be evidence of a defendant's lack of fraudulent intent [*United States v. Meyer*, 359 F.2d 837, 839-40 (7th Cir.), *cert. denied*, 385 U.S. 837 (1966)], it is certainly not dispositive. *See United States v. Boyer*, 694 F.2d 58 (3d Cir. 1982). In a mail fraud case the government need not prove that someone was harmed or that the defendant actually gained; however it must show that the defendant contemplated some actual harm or gain based on the misrepresentation. *United States v. Regent Office Supply*, 421 F.2d 1174, 1180 (2d Cir. 1970).

The Court finds that the record contains sufficient evidence to raise a genuine issue of material fact as to (1) what representations were actually made by defendants about commitments by third parties; (2) whether the representations were material; (3) whether the representations were made with fraudulent intent, i.e., with knowledge or reckless disregard of their falsity and with the intent to obtain rights and credit.

In addition to a scheme to defraud, a conviction for mail fraud requires a use of the mails or causing the use of the mails for the purpose of executing the scheme. *United States v. Bohonus*, 628 F.2d 1167, 1173 (9th Cir. 1980). In *Bohonus*, the Ninth Circuit explained the mail requirement:

> One causes use of the mails when he acts knowingly that the use of the mails will follow in the ordinary course of business, or where, though not intended, such use is reasonably foreseeable. [citations] Mailings do not have to be an essential part of the contemplated scheme, but they must be made (or

> caused to be made) for the purpose of executing the scheme. [citation]

628 F.2d at 1173.

It is not necessary that the scheme contemplate the use of the mails as an essential element. *Pereira v. United States*, 347 U.S. 1, 8 (1954). Mailing of documents which are themselves innocent may still constitute the crime of mail fraud if the documents are mailed in execution of a scheme to defraud.

The same tests apply to use of wire or interstate transmission facilities under the wire fraud statute.

The question then is whether defendants made use of the mails or wire communication for the purpose of executing the scheme. Ettlinger testified that on October 8, 1982 he talked to Schaen for the first time about the telecast rights. The call had been placed by Mr. Saltman. Although it is not clear whether Schaen made misrepresentations at the time of the call [*see* Ettlinger Deposition at 55], Schaen and Ettlinger agreed to meet. Ettlinger testified on the following day, October 9, Schaen called him to arrange the meeting at Jimmy's Restaurant. [Ettlinger Deposition at 56.] Obviously, a telephone conversation seeking a meeting may in itself appear to be innocent; however, it could also be seen as incident to a essential element of the scheme or an act in furtherance of the scheme. *See United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979) (defendant, who falsely advertised services as talent agency, used phone to set up meetings with women).

In *Pereiera v. United States*, 347 U.S. 1 (1954), the Supreme Court held that one "causes" the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary cause [*sic*] of business, or such use can reasonably be foreseen even though not actually intended." The evidence could support a finding that defendants Schaen and LeVitus caused Ettlinger to use the telephone to obtain letters of credit and have them transferred

to a bank in the Bahamas. [Ettlinger Deposition, Vol. 1 at 140.] Ettlinger's securing the letters of credit from his bank in Chicago was a necessary element of defendant's "scheme" to use plaintiff's good credit in order to secure sufficient funds to participate in the joint venture to obtain the television rights. *Cf. United States v. Maze,* 414 U.S. 395 (1974) (mailings occurring after fraud completed and not involving element of fraud by defendant not sufficiently related to defendant's scheme).

Each separate mailing in furtherance of a scheme to defraud is a separate violation of the mail fraud statute. RICO requires simply two violations of the enumerated acts—not two separate schemes to defraud. *Harper v. New Japan Securities International, Inc.,* 545 F.Supp. 1002 (C.D. Cal. 1982).

Transportation of Stolen Monies

[18 U.S.C. § 2314]

Plaintiffs argue that the same acts that constitute wire fraud by defendants also constitute transportation of stolen monies in violation of 18 U.S.C. § 2314. Obtaining the use of the letters of credit and the transmission of the letters of credit from Chicago to the Bahamas appears to fall within the scope of § 2314: *United States v. Walls,* 577 F.2d 690 (9th Cir. 1978); *United States v. Pomponio,* 558 F.2d 1172 (4th Cir. 1977).

The issues regarding fraudulent misrepresentations and intent to defraud which are both genuinely disputed and material to the wire and mail fraud claims are equally material to the transportation of stolen monies: whether the defendants made knowingly false representations with the intent to obtain the use of plaintiffs' credit.

Issues Without Substantial Controversy

Plaintiffs point to a number of other communications that they claim constitute additional uses of wire and mails in furtherance of the defendant's fraudulent scheme. However, it is clear that none of these is part of any identified or identifiable scheme to defraud.

The Court finds that the following issues are without substantial controversy:

1) Neither the internal memorandum of November 23, 1981, nor the "undated list" was mailed in furtherance of the scheme to defraud; and

2) Defendants' mail and wire communications to television stations, including letters, contracts and offers, were not made in furtherance of the scheme to defraud.

1. Internal Memorandum of November 23.

Plaintiffs rely on a memorandum dated November 30, 1981 from Schaen to LeVitus. [Defendant's Exhibit G.] The memorandum discussed dollar amounts that "SelecTV has generated in sales." A copy of this memorandum was sent to John Ettlinger. Plaintiffs argue that this memorandum contains false statements of fact and is part of defendants' scheme to defraud. Plaintiffs also argue that defendants failed to disclose the true state of affairs with their sales efforts.

At the time that defendants sent the November 30 memorandum to Ettlinger, SelecTV and Medallion were joint venturers in Medsel. Plaintiffs claim that as joint venturers, defendants had a duty to disclose the true state of affairs about the sales efforts. Defendants' failure to disclose amounted to a breach of fiduciary duty. Although a breach of fiduciary duty may constitute mail or wire fraud, not every breach is a violation of the criminal statutes. *See United States v. Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983). At the very least, the misrepresentation or nondisclosure must be material in order for defendants' conduct to be indictable. *United States v. Halbert*, 640 F.2d 100 [*sic*], 1007-1008 (9th Cir. 1981).

In this case, the alleged misrepresentations and non-disclosures as of November 10 could [*sic*] support a violation because the letters of credit were irrevocable. They could not be revoked as a matter of law. As a result, the alleged misrepresentations and non-disclosures could not have

altered plaintiffs' conduct. *United States v. Ballard*, 663 F.2d 534, 541-542 (5th Cir. 1981).

2. Communications to Television Stations.

Plaintiffs point to the numerous phone calls and mailings to television stations by defendants in their sales efforts. There is no evidence that these mailings and phone calls contained false or misleading statements. Nor has any evidence or argument been advanced to show how these communications were made in furtherance of the scheme to defraud. Indeed, these communications suggest that SelecTV attempted to sell the rights in fulfillment of its obligations under the joint venture agreement. On the record presented, defendants' communications with third parties relating to the purchase of the rights could not support a mail or wire fraud conviction because they are not related to a scheme to defraud.

Injury Required by RICO

Defendants argue that plaintiffs' RICO claim must fail because plaintiffs cannot show "racketeering enterprise injury" which defendants contend is the only type of injury compensable under RICO. In making this argument defendants rely on *Harper v. New Japan Securities International, Inc.*, 545 F.Supp. 281 (C.D. Cal. 1982) and *Johnson v. Rogers*, 551 F.Supp. 281 (C.D. Cal. 1982). Defendants made this same argument in their motion to dismiss which was denied by Judge Hall who distinguished this case from *Harper* and her opinion in *Johnson v. Rogers* on the ground that unlike a RICO claim alleging federal securities law violations, plaintiffs' claim based on mail and wire fraud cannot be remedied under any other federal statute. *See Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1177-78 (6th cir. 1978) (no civil remedy for mail fraud). Moreover, because the elements of mail fraud are different than common law fraud, plaintiffs may not have a remedy under state law.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that a pretrial conference shall be held on August 20, 1984, at 1:30 p.m.; the trial shall commence on September 25, 1984, at 9:00 a.m.

DATED: June 28, 1984

/s/ *Pamela Ann Rymer*

Pamela Ann Rymer
United States District Judge

TEXT OF 18 U.S.C. §§ 1961 AND 1962

§1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking

in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS §186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS §501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States,

a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received

any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS §2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities in the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

No. 87-1478

In The
Supreme Court of the United States
October Term, 1987

MEDALLION TELEVISION ENTERPRISES, INC. and JOHN ETTLINGER,

Petitioners,

v.

SELECTV OF CALIFORNIA, INC., JAMES LEVITUS, LIONEL SCHAEN and RICHARD KULIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 28.1 STATEMENT

SelecTV of California, Inc. is a wholly-owned subsidiary of Telstar Corporation. At the time of the events at issue, it was a subsidiary of SelecTV of America, Ltd., which was an affiliate of Clarion Co.

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The respondents, SelecTV of California, Inc., James Levitus, Lionel Schaen and Richard Kulis, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. The opinion, as amended on February 26, 1988, is reported at 833 F.2d 1360 (9th Cir. 1987). The District Court's opinion is reported at 627 F.Supp. 1290 (C.D.Cal. 1987).

REASONS WHY THE WRIT SHOULD BE DENIED

This case is not an appropriate vehicle for clarification of the "pattern" requirement contained in the RICO statute.

Before this Court decided *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275 (1985) ("*Sedima*"), several courts, including the District Court in this case, interpreted the RICO statute, 18 U.S.C. § 1961, *et seq.*, as permitting a plaintiff to establish that a defendant engaged in a "pattern of racketeering activity" in violation of the provisions of 18 U.S.C. § 1962, merely by showing that the defendant committed two or more "predicate acts" of "racketeering activity." See Appendix to Petition at p. 46a.

In *Sedima*, this Court noted that the RICO statute defined "pattern of racketeering activity" as requiring at least two acts of "racketeering activity." After examining the legislative history of the statute, the Court noted that "proof of two acts of racketeering activity, without more, does not establish a pattern." *Sedima*, 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 3285 n.14 quoting 116 Cong. Rec. 18,940 (1970) (statement of Sen. McClellan).

Since that decision, most of the courts which have considered the issue (as evidenced by the cases cited in the petition) have concluded that the "pattern" requirement of RICO cannot be satisfied by a mechanical counting of the number of predicate acts. In cases where mail fraud or wire fraud are the alleged predicate acts, a mechanical test would amount to a mere counting of the number of telephone calls placed or envelopes mailed.

An inevitable consequence of the rejection of a bright-line counting test, in favor of a test requiring a meaningful analysis of whether a "pattern" exists, is that courts will be called upon to undertake a case-by-case analysis of when and under what circumstances a pattern may be found. The Ninth Circuit recognized as much in its opinion in this case:

> Our approach admittedly does not provide a bright-line rule. We believe, however, that as more cases are decided, it will become easier to distinguish between cases like this and *Schreiber*, which involved single victims and isolated transactions with no indication that the defendant would need to commit further predicate acts, and cases like *Sun Savings* and *California Architectural*, which involved ongoing schemes, numerous victims, and a risk of continuing illegal activity.

833 F.2d at 1365, Appendix to Petition at 9a.

Yet, it is neither uncommon nor undesirable for the law to develop in such a manner. Certainly, "pattern" is no more difficult a concept to explain and develop through case-by-case analysis than "restraint of trade" under the Antitrust Laws, "minimum contacts" under jurisdictional decisions or "state action" under the Fourteenth Amendment.

The question, then, is whether there is anything about the record of this case or the opinions below which would enable this Court, if it accepted the case, to advance or enhance materially the development of the law under RICO. The answer, clearly, is no.

The substance of petitioners' claim is that they were fraudulently induced to enter into a joint venture agree-

ment to promote a boxing match. The alleged misrepresentations which induced them to enter into the joint venture were made at a face-to-face meeting in a restaurant. Yet, because two otherwise innocent telephone calls were placed to schedule that meeting, and because petitioners themselves used the wires to transmit the irrevocable letters of credit which served as their monetary contribution to the venture, they contend that a "pattern" may be found.

As the Ninth Circuit observed, "[i]f the fraud alleged here constitutes a pattern of racketeering activity, rare would be the fraud that could not be pleaded as a RICO case. Although we observe *Sedima's* mandate that RICO be construed broadly . . . we cannot believe that Congress intended that RICO should apply to a single isolated transaction such as this." 833 F.2d at 1365, Appendix to Petition at 9a.

Thus, assuming, *arguendo*, that the Circuits differ with regard to where, on the continuum between no pattern and clear pattern, they draw the line at which a plaintiff's case succeeds or fails, none of the cases cited by petitioners would support the finding of a pattern in this case.[1]

Stated simply, the only way a "pattern" could be found on this record would be if the Court retreated from

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[1]Petitioner makes much of the fact that the Ninth Circuit, in *Sun Savings & Loan Ass'n. v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987), expressed reservations about the District Court's reported decision in this case. In fact, Judge Norris, who authored the Ninth Circuit's opinion in this case and served on the panel that decided *Sun Savings*, explained why the reservations expressed in *Sun Savings* proved to be of no concern after a review of the record in this case. Appendix to Petition at 8a-9a.

footnote 14 of *Sedima*, returned to the bright-line test which some courts followed prior to *Sedima*, and held that two or more predicate acts, standing alone, satisfy the pattern requirement of the statute. Given the breadth of the mail fraud and wire fraud statutes, such a rule would often yield nothing more than a mere mechanical counting of telephone calls and mailings and would bring within the jurisdiction of the federal courts virtually every common-law fraud action. *See Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986) (concurring opinion of Cudahy, J.); *Tkaczuk v. Weil*, [1987] Fed. Sec. L. Rep. (CCH) ¶ 93,199 at p. 95,932 (N.D. Ill. 1987).

Finally, petitioners' assertion, that a party who allegedly commits fraud also commits an additional "predicate act" if it fails thereafter to advise the victim that it defrauded him, is a bootstrap argument which cannot serve as a basis for creating a pattern where none exists.

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CONCLUSION

For the foregoing reasons, respondents respectfully urge the Court to deny the petition for a writ of certiorari.

Dated: April 1, 1988

Respectfully submitted,

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